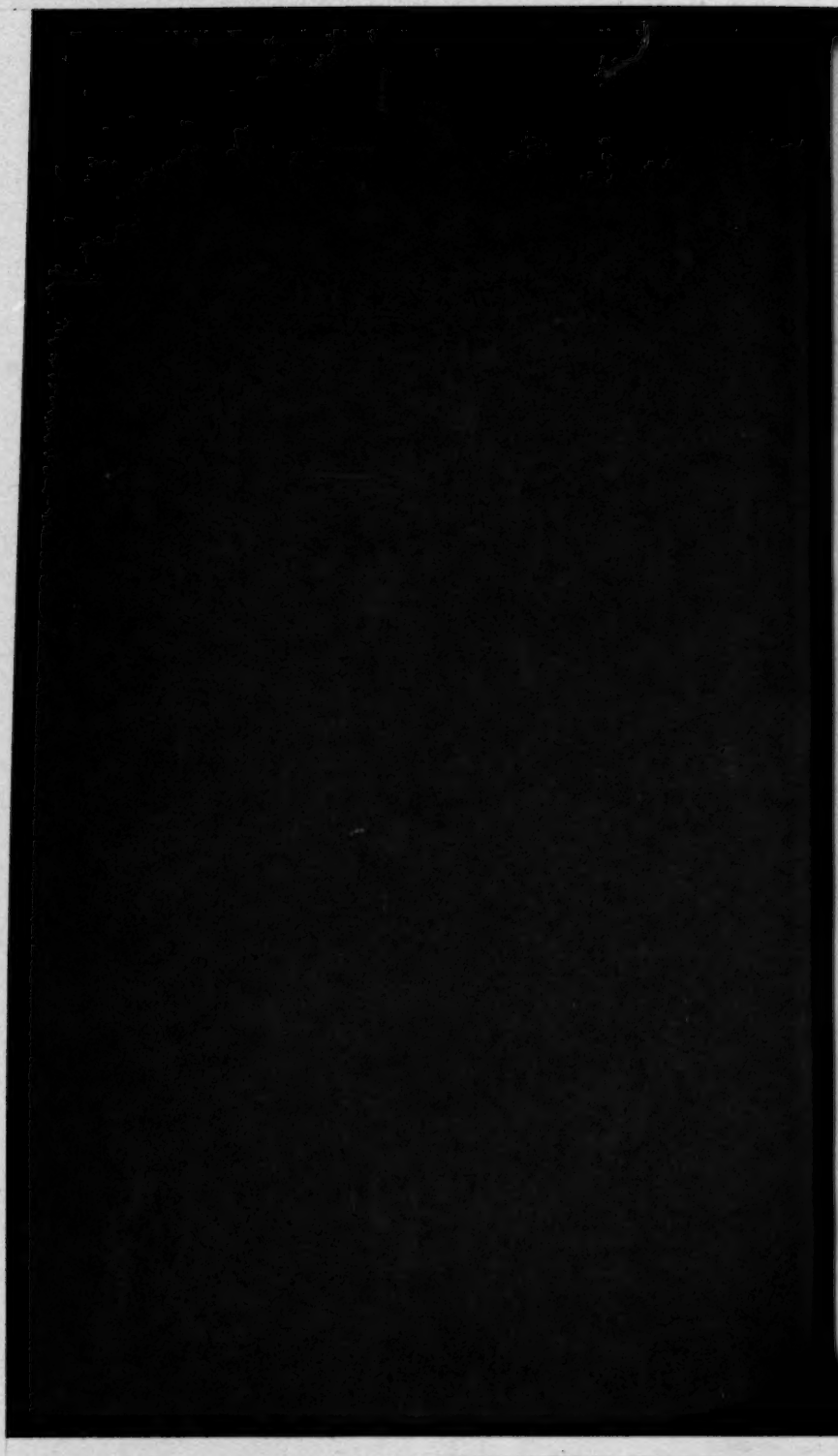

BLEED THROUGH POOR COPY

INDEX TO BRIEF

	PAGE
Opinion Below	2
Constitutional and Statutory Provisions Involved	2
Question Presented	3
Statement of the Case	4
Summary of Argument	6
Argument:	
I. The Purpose and Primary Effect of the Act Relate to the Serious School Financial Problem of the Commonwealth	7
A. The legislative intent is real and uncontradicted	7
B. The primary objective and effect of the Act are economic and not religious	9
II. Incidental Effects Do Not Create Unconstitutionality Because of Asserted Religious Benefits, Entanglement and Divisiveness	14
A. Mere benefits incidentally accruing to religious groups are immaterial	14
B. No entanglement is involved	16
C. Minimal payments for benefits do not significantly entail political disagreement on religious grounds	17

III. Conclusion 20

TABLE OF CITATIONS

CASES:

Board of Education of Central School Dist. No. 1 v. Allen, 392 U.S. 236 (1968) ...8, 9, 11, 14, 15, 16

Everson v. Board of Education, 330 U.S. 1 (1947) 8, 9, 11, 14, 15, 16

Lemon v. Kurtzman, 403 U.S. 602 (1971) 8, 17, 19

Tilton v. Richardson, 403 U.S. 672 (1971) 11, 14, 16, 19

Walz v. Tax Commission, 397 U.S. 664 (1970) 11, 14, 17

Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio 1972) aff'd sub nom. Essex v. Wolman, U.S. , 41 U.S.L.W. 3182 (October 10, 1972) 13, 14, 18

U. S. CONSTITUTION:

First Amendment 2, 11, 13

PENNSYLVANIA CONSTITUTION:

Article III, §14 8

STATUTES:

Parent Reimbursement Act for Nonpublic Education, Pa. Stat. Ann., Tit. 24, §5701 et seq. (Supp. 1972) ...2, 4, 6, 7, 8, 9, 10, 11, 12, 16, 17, 18, 19, 20

BLEED THROUGH POOR COPY

Pennsylvania Cigarette Tax Act, Pa. Stat. Ann., Tit. 72, §3169.101 et seq. (Supp. 1972) 18

AUTHORITIES:

Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970) 11

MISCELLANEOUS:

Statistical Report of the Secretary of Education for the School Year Ending June 30, 1971 9

BLEED THROUGH POOR COPY

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972
No. 459

GRACE SLOAN as State Treasurer of the Commonwealth of Pennsylvania

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife, and HENRY E. CROUTER,
Appellants

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLANT, GRACE SLOAN

OPINION BELOW

On July 21, 1972, the three-judge District Court granted Appellees' (plaintiffs below) Motion for Summary Judgment based on an Opinion of April 6, 1972, which denied Appellants' (defendants' below) Motions To Dismiss. That Opinion is reported at 346 F. Supp. 1356 (E.D. Pa. 1972) and is in the Appendix beginning at page 37a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I, as applicable to the States by the Fourteenth Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Parent Reimbursement Act for Nonpublic Education, Act 92 of the Laws of Pennsylvania, 1971, P. L. ——, Pa. Stat. Ann., Tit. 24, §5701, et seq. (Supp. 1972) (hereinafter, the Act). The Act is set forth in the Appendix, commencing at page 56a.

BLEED THROUGH POOR COPY

QUESTION PRESENTED

Is the Constitution violated by a State's economically motivated program for parental reimbursement of a small portion of the cost of nonpublic education which helps to relieve the State of its burden of supplying education to the children of such parents?

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania in enacting its Parent Reimbursement Act for Nonpublic Education stated in the title of the Act that its purpose was to avoid "increased costs of public education" (App. 56a). Section 2 of the Act further stated that parents who maintain their children in nonpublic schools "provide a vital service to the Commonwealth" (App. 58a). Under the Act parents of nonpublic students are reimbursed $75 for elementary school tuition and $150 for secondary school tuition.

On September 13, 1971, Appellees filed a Complaint attacking the Act and alleging that it violated the Establishment, Free Exercise and Equal Protection Clauses of the Constitution. Thereafter, parents of children attending sectarian and nonsectarian nonpublic schools in the State intervened as parties defendant.

All defendants moved to dismiss the Complaint for failure to state a claim for relief. On April 6, 1972, the three-judge District Court denied these motions (App. 56a). On April 28, 1972, the Court granted motions of the defendants to dismiss those counts of the Complaint relating to the Free Exercise and Equal Protection Clauses (App. 64a).[1]

After all defendants filed answers, plaintiffs moved for summary judgment. That motion was granted

[1] Appellees have not appealed from that determination.

BLEED THROUGH POOR COPY

on July 21, 1972 and the Court, relying on its previously filed Opinion of April 6, 1972, permanently enjoined the State Treasurer from paying any funds to parents of children attending nonpublic schools.

SUMMARY OF ARGUMENT

A legislatively stated purpose, real and uncontradicted, should be given due regard in the exercise of judicial power to upset legislative enactments. In this case the legislative purpose is stated unequivocally and there is no contrary averment of the fact. The principal and primary effect of the Act is the achievement of its stated purpose. Other effects of the Act are not truly significant because: (1) benefits to religion are only incidental and indirect; (2) there is no entangling relationship with religion; and (3) a small payment for valuable services which are the primary obligation of the Commonwealth under its Constitution does not create a climate for significant political disagreement.

BLEED THROUGH POOR COPY

ARGUMENT

I. THE PURPOSE AND PRIMARY EFFECT OF THE ACT RELATE TO THE SERIOUS SCHOOL FINANCIAL PROBLEM OF THE COMMONWEALTH

The constitutionality of enactments frequently turns upon the real purpose of the legislation. Legislative findings can support the constitutionality of an act. Constitutionality that turns upon facts is subject to judicial review. First, it will be shown that the purpose of the Act is bona fide and uncontested. Second, it will be shown that the primary objective and effect of the Act is economic and not religious.

A. The Legislative Purpose Is Real and Uncontradicted

In no uncertain terms the Legislature stated its purpose in the title of the Act as follows:

> "Creating an authority *for the purpose of avoiding increased costs of public education* by providing partial reimbursement for nonpublic education and defining its powers and duties." (Emphasis supplied.) Preamble, Act (App. 56a).

Section 2 of the Act declared the public policy of the Commonwealth, making its legislative finding that (1) "parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education;" (2) the welfare of the Commonwealth mandates a compulsory school attendance law; (3) rising costs place in jeopardy the ability of parents to carry the burden of nonpublic education as a major contribution to public welfare; and (4) operating and capital costs, if there were no nonpublic schools, would amount to $400,000,000 annually for operations and $1,000,000,000 for the construction of new facilities, and any substantial portion of those operating and capital costs would seriously jeopardize public education (App. 57a-58a).

The stated legislative purpose is clear and there can be no question at this juncture that the State has a pervasive and legitimate interest in the education of its citizens. " '[The State's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.' [citation omitted.]" *Board of Education of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 247 (1968); Pa. Const., Art. III, §14. Moreover, as this Court recognized in *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971), "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." The State has expressed its concern in enacting this legislation and its publicly expressed purpose must be afforded due deference. *Lemon v. Kurtzman*, supra, at 613; cf. *Everson v. Board of Education*, 330 U.S. 1, 6-7

BLEED THROUGH POOR COPY

(1947). This is especially so where there is nothing in the record before this Court from whence a contrary conclusion could be drawn. A comparable point is made in *Allen*, supra, at 243, as follows:

> "* * * The express purpose of §701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. * * *"

B. The Primary Objective and Effect of the Act Are Economic and Not Religious

---

In 1970, 517,000 students were enrolled in nonpublic schools. Statistical Report of the Secretary of Education for the School Year ending June 30, 1971, Table 28. The total enrollment of pupils in public schools at the same time was 2,407,000. *Id.* Table II. When one considers that the total general fund expenses compiled from the annual financial reports of Pennsylvania school districts show the total cost per public school pupil in the school year 1970-71 to be $980.82 (*Id.*, Table 56) it must be acknowledged not only that a parent is performing a valuable service to the State by educating his child in a nonpublic school (for which he will receive under the Act a small amount in return for his service) but also that a tremendous financial burden would be placed on the State by the enrollment of a substantial number of nonpublic students in public

schools. It was this overriding consideration which led to the passage of the Act.

The overwhelming cost to the State of educating a substantial number of nonpublic school students in the public school system is a fact of record in this case. The uncontroverted legislative finding has determined that the financial burden to the State of undertaking such an effort would be approximately one and a half billion dollars. Assuming the State had the wherewithal to finance such a magnitudinous undertaking, it cannot be gainsaid that education throughout the State would suffer drastically during the period of transition.

A high estimate of the cost of the parent reimbursement program would be approximately 75 million dollars. When this amount is compared with the legislature's determination that the cost to the State of educating all nonpublic school students in public schools would be one and a half billion dollars, it can be seen that the Act constitutes a sound, economical means of saving the State vast sums of money and assures the continuation of equal educational opportunities for all school children in the Commonwealth.

Moreover, the means employed by the legislature to avoid this real and substantial economic burden is constitutionally sound.

A close scrutiny of the Act reveals that it is the best possible alternative to achieve the proper secular purpose of the Act (to save the State massive amounts of money) and to avoid any benefits to sectarian nonpublic schools except the most tangential and indirect

BLEED THROUGH POOR COPY

ones. From decisions of this Court, this is precisely what the "primary effect" theory requires of all states to comply with the First Amendment. They must seek to serve a secular purpose and, in accomplishing this purpose, must use the alternative available which least benefits, tangentially and indirectly, the sectarian interests. See *Everson*, supra; *Allen*, supra; *Walz*, supra and *Tilton*, supra. This approach is more readily acceptable under the existing state of the law than that urged in Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1322 (1970) where the author espouses: "The Court should intervene only on the basis of proof of an intention to favor or disfavor religion relative to nonreligion, or one religion relative to others."

The Act gives money to parents in the form of a tuition reimbursement. Payment is made only after the parent has paid tuition and only after the school year for which reimbursement is sought has passed. Payment is not made to the school, nor is there any requirement whatsoever placed on the parent to use the money received either to pay his child's tuition for the following year or to use it for any religious or nonreligious purpose.[2] There is no requirement that the parent continue to maintain his child in a non-

[2] The instant legislation bears witness to the care employed by the drafters. The legislature did not direct payments to be made directly to the school, nor did it give moneys to parents for transmittal to the school. Rather it employed a reimbursement program to secure the best possible means of effecting its purpose without at the same time advancing religion.

public school of any kind, be it sectarian or nonsectarian. The Act is designed to provide assistance to parents to enable them to maintain their program of using nonpublic schools.

The three-judge Court did not grasp the full significance of this act and therein lies its error. The Court concluded that "the effect of the Act is to aid the schools" (App. 51a) and that the failure to ensure that the reimbursement which the parent receives is restricted to use for nonreligious services or activities renders the Act unconstitutional. This is erecting a high wall indeed!

The three-judge Court observed: "If parents cannot afford to pay the tuition, they must take their child out of the nonpublic schools and if enough parents are unable to pay these costs, the schools will be forced to close" (App. 52a). The Court then stated, apparently contradicting its earlier finding that the Act had a valid secular purpose, that it was "precisely this possibility that led" to the enactment of this legislation (App. 52a). Firstly, the uncontroverted legislative findings belie this conclusion. Secondly, the Court has confused one possible effect with the "principal and primary effect."

The State's paramount concern was not the closing of nonpublic schools; it was avoiding "increased costs of public education" (App. 56a) by any significant shift of students from nonpublic to public schools, coupled with the serious general problem of inflation. Any tangential benefit which sectarian schools might derive from the effectuation of this overriding State interest is purely that: tangential,

BLEED THROUGH POOR COPY

and nothing more. Most significant, however, is that the District Court completely distorts the meaning of the "principal and primary effect" test. Thus, the Court states that the principal and primary effect test does not mean that a Court is required to conclude that "the scheme of assistance will necessarily aid religion" (App. 49a). If principal and primary effect does not at least mean that much, then a poor choice of words has been employed in articulating this test.

The recent decision in *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio 1972) (three-judge District Court), aff'd sub nom. *Essex v. Wolman*, U.S. , 41 U.S.L.W. 3182 (October 10, 1972) warrants discussion. The case concerned a First Amendment attack on a section of an Ohio Statute which provided for educational grants to parents of children in nonpublic schools to reimburse them for a portion of the cost incurred by them in educating their children. The three-judge District Court found this legislative plan to be unconstitutional. Significantly, the Court, while it did discuss the principal and primary effect test (342 F. Supp. at 412-413), was unable to conclude that the principal and primary effect of the legislation was the advancement of religion. 342 F. Supp. at 413. The Court did find the enactment violative of the third prong of this Court's tripartite test for Establishment Clause questions namely that the legislation created an entangling relation between religion and the State.

There are several substantial differences between the Pennsylvania and Ohio Acts, and they are discussed in Part II of this brief. The point, however,

is that this Court, in summarily affirming that case did not even by implication pass on the merits of this case since the *Wolman* decision was not predicated upon the principal and primary effect test.

II. INCIDENTAL EFFECTS DO NOT CREATE UNCONSTITUTIONALITY BECAUSE OF ASSERTED RELIGIOUS BENEFITS ENTANGLEMENT AND DIVISIVENESS

A. Mere Benefits Incidentally Accruing to Religious Groups Are Immaterial

---

This Court has recognized repeatedly that the principal and primary effect test does not turn on whether a religious institution derives some benefit from a government program. Thus, the fact that one of the consequences of a given act may tangentially benefit religion is not determinative. For certainly in *Everson, Allen, Walz,* and *Tilton v. Richardson,* 403 U.S. 672 (1971), religious institutions derived some "aid". *Walz,* supra, at 670-673. As this Court made clear in *Tilton,* supra, at 679:

> "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

In *Everson,* supra, this Court held that a New Jersey statute which authorized the spending of tax

BLEED THROUGH POOR COPY

raised funds to pay the bus fares of parochial school pupils as part of a general program under which it paid the fares of pupils attending public and other schools did not violate the Establishment Clause. In reaching this conclusion, this Court recognized that the children and parents were the principal beneficiaries of the legislation even though the Church schools would derive some benefit from such a program: "It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the state." *Id.* at 17. This Court did not deem such an ancillary benefit to the church schools to be controlling.

In *Allen,* supra, this Court held a New York law requiring school districts to purchase textbooks and loan them free of charge to students enrolled in church-related schools as well as in public and private schools to be consistant with the dictates of the Establishment Clause. Again, this Court recognized that the principal beneficiaries of the legislation were the students. *Id.* at 243. Again, this Court did not find controlling the possibility that the church-related schools might benefit from the program:

> "Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support." *Id.* at 244.

Most recently, in *Tilton v. Richardson*, supra, this Court, in upholding the construction grant program for church-related colleges and universities under the Higher Education Facilities Act of 1963, recognized that construction grants "surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions." *Id.* at 679. Yet this factor did not persuade the Court that the principal and primary effect of the legislation was the advancement of religion.

As an alternative holding, the District Court below concluded that "the Act supports religion because it aids parents in providing a religious education for their children" (Appendix, p. 54a). But as this Court expressly recognized in *Everson* and *Allen*, the possibility that parents, might withdraw their children from nonpublic church-related schools because of a lack of the state assistance involved, does not in and of itself indicate that the principal and primary effect of the legislation was the advancement of religion.

B. No Entanglement Is Involved

The three-judge district Court, having concluded that the effect of the Act was the advancement of religion, did not formally determine whether the Act gave rise to an entangling relationship between religion and the State. However, implicit in the Court's determination was a recognition that there is no problem of "entanglement" with this legislation. Thus, the Court noted in a footnote that only if the

BLEED THROUGH POOR COPY

Act included restriction on the use of the funds given to the parents would the State have to concern itself with avoiding excessive entanglement with religion in administering these restrictions (App. 52a, footnote 8).

The Act, of course, places no restrictions on what the parents may do with the funds they receive. In addition, Section 4 of the Act, unequivocally states that the Pennsylvania Parent Assistance Authority "shall exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program or instruction or any other aspect of the administration or operation of any nonpublic school or schools" (App. 60a). It can be seen from the terms of the Act itself that it countenances no direct relationship between the funding authority and the nonpublic schools. Absent even a tangential relationship, it is impossible to conclude that the Act could give rise to excessive entanglement. Certainly the Reimbursement Program does not "encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards." *Walz*, supra, at 675.

C. Minimal Payments for Benefits Do Not Significantly Entail Political Disagreement on Religious Grounds

---

This Court has recently become concerned with the "divisive political potential" *(Lemon v. Kurtzman*, supra, at 622) of State programs which are attacked on Establishment Clause grounds and the

possibility of political division along religious lines. There is nothing in the Act itself or its history or in the record in this case which might suggest that such a potential exists here.

The fund from which a parent receives reimbursement under the terms of the Act is created by setting aside to the use of the Parent Assistance Authority a fixed percentage of the tax revenues collected by the Pennsylvania Department of Revenue pursuant to the Act of July 22, 1970, P. L. 513, Pa. Stat. Ann. Tit. 72, §3169.101, et seq. (Supp. 1972) known as the "Pennsylvania Cigarette Tax Act." Thus, the Parent Reimbursement Fund does not depend on annual appropriations. Moreover, payments to parents can be made only from that fund and from no other source (Section 4 of the Act, App. 60a). Section 9 of the Act (App. 62a) reinforces this point by providing that in the event there are insufficient monies in the Parent Reimbursement Fund to pay all the claims submitted by parents a proportionate amount would be paid to each claimant based on the total amount contained in the Fund. This is one striking difference between the Act and the legislation held unconstitutional in *Wolman v. Essex*, supra.

The Ohio Parent Reimbursement Plan provided that the amount of monies distributed to claimants could not exceed the specific appropriations made therefor by the Ohio General Assembly. Thus that program was fraught with the possibility of annual legislative and public debates on the proper size of the appropriation. That possibility does not exist here. Furthermore, the Ohio Reimbursement Pro-

BLEED THROUGH POOR COPY

gram contained a provision which allowed the Ohio Board of Education to "determine" the amount of reimbursement for subsequent years and presumably to increase or decrease the amount of reimbursement. There is no such ongoing friction point in the Pennsylvania Act.

The Act thereby avoids the problem of political fragmentation on religious lines which this Court found to be present in the legislation found unconstitutional in *Lemon v. Kurtzman.* Here, this Court is not "confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups" 403 U.S. at 623. Rather, a percentage of the revenue collected pursuant to an ongoing collection process is diverted to create the Parent Reimbursement Fund.

Just as there is nothing in the Act itself to indicate that it is fraught with the potential for political divisiveness, neither is there anything in the record in this case to suggest it. As this Court recognized in *Tilton,* it is "difficult to document" those factors which might indicate that a given piece of legislation creates or increases the potential for divisive religious fragmentation in the political arena. 403 U.S. at 688. But this Court properly observed that the burden is on the party attacking the constitutionality of the legislation on this ground to point to "any continuing religious aggravation on this matter in the political processes." *Id.* Appellees herein have not pointed to anything which might remotely approximate divisiveness on religious lines.

III. CONCLUSION

The discussion of the constitutional standards in Establishment Clause cases have necessarily been treated separately in this brief for purposes of analysis. Yet, in determining the constitutionality of the Act, this Court must synthesize those tests and determine, on the whole, whether this Act is a law respecting the establishment of religion. The undisputed economic motivation of the Pennsylvania legislature and its mode of effectuation, examined in all aspects, are clearly secular in fact as well as in law. Accordingly, the Order of the Lower Court granting summary judgment to appellees should be reversed, and summary judgment should be directed in favor of the appellants.

Respectfully submitted,

ISRAEL PACKEL
Attorney General
PETER W. BROWN
Deputy Attorney General
J. JUSTIN BLEWITT, JR.
Deputy Attorney General
Attorneys for Appellants
State Capitol Annex Building
Harrisburg, Pa.

BLEED THROUGH POOR COPY